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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,
v.
UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ATLANTIC RICHFIELD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae will address the question whether Sections 101 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") authorize an award of attorneys' fees to a private party that enforces another party's statutory obligation to pay its share of "response costs."

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BRIEF OF ATLANTIC RICHFIELD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Atlantic Richfield Company ("ARCO") is one of the nation's largest integrated oil companies.[1] Because of its widespread oil operations, ARCO has been identified as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[2] at over 100 Superfund sites.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk of the Court.

[2] 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986 (the "SARA Amendments"), Pub. L. No. 99-499, 100 Stat. 1613,

ARCO has a particular interest in the specific issues addressed in this case, because at a number of sites, ARCO has performed CERCLA cleanup work even though other parties were partially—or exclusively—responsible for the contamination, and thus, for the remediation, of the particular site. ARCO has completed remediation of ten sites in recent years, and has entered into numerous consent orders and decrees with EPA to clean up contamination caused by past disposal actions of some of its corporate predecessors.

To illustrate, ARCO is performing cleanup of the Sand Springs Petrochemical Complex Superfund Site ("the Sand Springs Site") in Sand Springs, Oklahoma, pursuant to a consent decree. The Sand Springs Site primarily consists of various pits, ponds, and lagoons contaminated by former refinery operations for which ARCO did not dispute responsibility. The remainder, identified by EPA as the Glenn Wynn Site, contained waste from an oil and solvents recycling operation that began operations after ARCO had ceased refining. The recycling operation was never owned or operated by ARCO.

Nonetheless, under its consent decree with EPA, ARCO is performing cleanup on the *entire* Sand Springs Site, including the Glenn Wynn Site, despite the fact that EPA records showed that over 700 other parties had shipped waste to the Glenn Wynn Site. ARCO alone completed the remediation of the Glenn Wynn Site in 1992, at a cost of over $9 million. To recover the response costs it incurred, ARCO instituted an action pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, against over 300 of the larger contributing liable parties who did not participate in the remediation. The district court held that ARCO was not entitled to recover the attorneys' fees it had expended in enforcing the obligations of other parties to pay response costs.

Thus, ARCO has an ongoing involvement and interest in the development of the growing body of law interpreting CERCLA generally and its provision concerning the recovery of response costs specifically. Moreover, the recoverability of CERCLA attorneys' fees can be expected to have a major impact on the willingness of private parties to undertake major remediation projects pursuant to consent decrees. Thus, the view of ARCO, as an *amicus curiae* significantly involved in the CERCLA process, should assist the Court in resolving this important issue of environmental law.

SUMMARY OF ARGUMENT

This case presents a straightforward and vital question of statutory construction: Does CERCLA authorize an award of attorneys' fees to a private party that enforces another party's statutory obligation to pay its share of "response costs" pursuant to Section 107 of CERCLA? The answer does not lie, as the court of appeals assumed, in Congress' failure to use any "magic words," but rather, lies in the plain language of CERCLA. Here, CERCLA provides the necessary explicit statutory authorization that the "American Rule" requires for a party to be permitted to recover its attorneys' fees.

Congress has made plain that private parties, not just the government, enforce CERCLA. CERCLA permits private parties, in addition to individual States, Indian tribes, and the United States, to clean up hazardous wastes and, like the government, to bring lawsuits to enforce CERCLA's liability provisions against other responsible parties. 42 U.S.C. § 9607(a). Private parties may in such actions recover their "necessary costs of response," a term which CERCLA expansively defines to include "costs" of their "enforcement activities." *Id.* § 9601(25).

Sections 101 and 107, read together, provide explicit authorization for awarding attorneys' fees in private cost-recovery actions. That is because such an action is an "enforcement activity," the major "necessary cost" of which is attorneys' fees.

Any suggestion that only the government, and not private parties, may recover attorneys' fees under Section 107 disregards the fact that the definition of recoverable response costs was placed by Congress in a section of the statute of general applicability, not in a section that relates solely to the government. Likewise, the structure of the statute belies any assertion by the government that attorneys' fees are recoverable in actions to compel cleanups—which can be brought only by EPA—but not in cost-recovery actions. Further, reading "enforcement costs" to include attorneys' fees is wholly consistent with the purpose and structure of CERCLA, which seeks in large part to promote private remediation of hazardous waste contamination.

The court of appeals, ignoring this natural reading of the statute, imposed a requirement that Congress can authorize attorneys' fee awards only by using "magic words" such as "attorneys' fees" or an exact synonym.[3] No "magic words" are necessary, because Congress has made its intent clear in the text of CERCLA. This Court should give effect to that explicit intent by holding that private parties may recover attorneys' fees in cost-recovery actions under CERCLA.

[3] *See Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993); *Key Tronic Corp.* v. *United States*, 984 F.2d 1025 (9th Cir.), *cert. granted*, 114 S. Ct. 633 (Dec. 13, 1993) (No. 93-376). Both cases raise the attorneys' fees issue presented here, and both were decided by the same panel of the Ninth Circuit on the same day. *Stanton Road* was the lead decision and fully sets forth the analysis that was followed in both cases. Consequently, *amicus* will refer to that decision throughout this brief, even though the case before this Court on *certiorari* is the *Key Tronic* decision.

ARGUMENT

CERCLA EXPLICITLY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PRIVATE PARTY THAT ENFORCES CERCLA'S LIABILITY PROVISIONS.

Under the "American Rule," the prevailing party in a lawsuit may not recover its attorneys' fees absent "explicit [congressional] provisions for the allowance of attorneys' fees." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975); see also *Runyon* v. *McCrary*, 427 U.S. 160, 185 (1976). In enacting and amending CERCLA, Congress made such "explicit provisions" for private parties to recover attorneys' fees incurred in cost-recovery actions. The language and context of CERCLA make plain that private parties may engage in "enforcement activities," the "necessary costs" of which are recoverable. And attorneys' fees cannot be construed as other than a "necessary cost" of a private party's cost-recovery action. Thus, although Congress did not use "magic words" in CERCLA, it nonetheless made explicit in the statute its intent that attorneys' fees may be awarded to prevent private litigants from suffering out-of-pocket losses in bringing cost-recovery actions.

A. Congress Amended CERCLA In 1986 To Encourage More Vigorous Enforcement By Private Parties, Not Just By The United States.

Congress enacted CERCLA "to provide the authority and resources to clean up hazardous substance releases." S. Rep. No. 11, 99th Cong., 1st Sess. 3 (1985) (Report of Senate Committee on Environment and Public Works). As this Court has observed, Congress sought to reach this goal through a two-pronged approach that "provides a mechanism for cleaning up hazardous waste sites, . . . and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989).[4]

[4] *See also* H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. III, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038 (Report of

To accomplish these twin goals, CERCLA contains "sweeping" liability provisions, making liable for remediation expenses "*everyone* who is potentially responsible for hazardous-waste contamination." 491 U.S. at 21 (plurality opinion) (emphasis in original). Thus, Section 107(a) designates broad categories of parties who may be liable for remediation expenses, often referred to generally as potentially responsible parties, or PRPs. 42 U.S.C. § 9607(a).

Congress recognized, however, that the mere threat of potential liability would not, standing alone, always motivate PRPs to engage in the cleanup of hazardous waste CERCLA was enacted to achieve. Consequently, Congress included in CERCLA a cost-recovery scheme, *Union Gas*, 491 U.S. at 7, that is central to the accomplishment of CERCLA's purposes. See *id.* at 21 (plurality opinion).

Governmental cleanup and cost recovery constitute one element of this cost-recovery scheme. CERCLA Section 104 authorizes the United States or a State to clean up a contaminated site. The appropriate governmental entity may then bring a cost-recovery action against any PRP under Section 107(a)(4)(A).

Congress understood that CERCLA's goals would not be met if the government were the only party to conduct cleanups. "[T]he Government's resources being finite, it [can] neither pay up front all necessary cleanups nor undertake many different projects at the same time." *Union Gas*, 491 U.S. at 21 (plurality opinion). Congress accordingly created incentives for private cleanups by "allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties." *Id.* at 21-22. To this end, CERCLA

House Committee on the Judiciary) (purposes of CERCLA "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups").

provides that private parties may take action to respond to releases of hazardous substances. See 42 U.S.C. § 9604(a)(1).[5] In a subsection separate from that authorizing governmental cost recovery, private parties are also authorized to bring an action against other PRPs to recover "any other necessary costs of response incurred by the [suing party] consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act of 1986 ("the SARA Amendments"). In these amendments, Congress was determined to increase the private enforcement of CERCLA to remedy EPA's "appalling failures" in administering the program. H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. I, at 56 (1985), *reprinted in* 1986 U.S.C.C.AN. 2835, 2838 (Report of House Committee on Energy and Commerce). EPA's prior enforcement of CERCLA had been

> victimized by gross mismanagement and policies which limited expenditures for site cleanups . . . .

[5] Although Section 104(a)(1) relates to private cleanup effected under EPA's direction, "[t]his provision is not intended to preclude or discourage responsible parties from conducting cleanup actions without the formal permission of the Federal government." H.R. Rep. No. 253, 99th Cong., 1st sess., pt. I, at 67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2849 (Report of House Energy and Commerce Committee). Therefore, it is widely recognized that a party that has acted to clean up hazardous wastes, even though not under EPA's direction, may maintain a Section 107 cost-recovery action. *See, e.g., Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988); *Cadillac Fairview/California, Inc.* v. *Dow Chem. Co.*, 840 F.2d 691 (9th Cir. 1988); *Richland-Lexington Airport Dist.* v. *Atlas Properties, Inc.*, 901 F.2d 1206, 1208-09 (4th Cir. 1990); *but see Bulk Distribution Ctrs., Inc.* v. *Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984) (a private plaintiff may not bring a cost-recovery suit unless the government has also incurred response costs with respect to the site). Indeed, in this case, Key Tronic voluntarily took remedial action, and then sought to require other responsible parties to pay their fair share of the cost of remediation.

> As a result of [Congressional Subcommittee investigations], over twenty top-level officials, including the Administrator of EPA, resigned or were fired from their jobs . . . . Understandably, the combination of promises which could never be kept with the limited resources available and the gross mismanagement of the program, have created mistrust in the public and in Congress.

Id. at 55.

EPA's abject failures, combined with the expectation that "EPA will never have adequate monies or manpower to address the problem," led Congress to conclude that it "must facilitate cleanups of hazardous substances by the responsible parties . . .,"[6] *id.*, and "encourage private party cleanup at all sites."[7] *Id.* at 2883. Indeed, 60 percent of all cleanups are conducted by private parties.[8]

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[6] In light of Congress' strongly expressed disappointment, at the time of the SARA Amendments, with EPA's performance in implementing CERCLA, the United States cannot plausibly assert that Congress continued to expect EPA to play the primary role in carrying out CERCLA's "enforcement activities."

[7] This private enforcement aspect of CERCLA is not unique; this Court has repeatedly acknowledged that the ability to enforce federal rights is not limited to governmental actors. In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Court observed that "Congress has [often] opted to rely heavily on private enforcement to implement public policy." *Id.* at 263. The civil rights statutes, 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 also provide examples of statutes in which Congress has authorized private enforcement of federal rights. *Cf. Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 109 (1989). *Id.* at 109 ("We agree with the petitioner that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983"). Similarly, a private Section 107 action enforces CERCLA's liability provisions against responsible parties.

[8] *See* Office of Emergency & Remedial Response, U.S. Environmental Protection Agency, *Progress Toward Implementing SUPERFUND, Fiscal Year 1990* 15 (Feb. 1992).

B. Congress' Intent To Authorize Attorneys' Fees Awards Is Made Explicit In Section 101 Of CERCLA.

In determining whether CERCLA authorizes attorneys' fees in private cost-recovery actions, the starting point is, of course, the statute's language. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58 (1990). In the 1986 SARA Amendments, Congress expanded the definition of response costs that private parties may recover to read as follows: "the terms 'respond' or 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25).[9] This definition of recoverable "response" costs necessarily and unambiguously encompasses attorneys' fees.

Courts—including the court below—have recognized that a natural reading of " 'costs' of 'enforcement activities' " includes attorneys' fees: "[a]ttorneys' fees are incurred in every private action to enforce rights embodied in a federal statute where the litigant is represented by counsel." *Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993). Similarly, the Eighth Circuit has observed: "Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it wou'd strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover." *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

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[9] Prior to 1986, the term "response" was defined as meaning "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25) (1982). The SARA amendments added: "all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25) (1988).

This natural reading of "enforcement costs" is squarely supported by the terms' context. Enforcement of a party's liability obligations is a CERCLA "enforcement activity" as clearly as is enforcing a party's obligation to conduct a cleanup. Indeed, the only "enforcement activity" a private party may take under CERCLA Section 107 is enforcement—through a lawsuit—of another party's liability for response costs under that section.[10]

And because the primary cost to a private party of bringing a lawsuit is attorneys' fees, the right to recover the "costs" of "enforcement activities" would be largely meaningless unless it included the right to recover attorneys' fees.[11] It is axiomatic that a statute must be construed so as to give effect to *all* its terms. *Department of Revenue* v. *ACF Indus., Inc.*, No. 92-74, slip op. at 7 (U.S. Jan. 24, 1994) (" 'statute should be interpreted so as not to render one part inoperative' ") (quoting *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)); *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 369 n.14 (1986).[12]

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[10] As the Eighth Circuit recognized, a "private party cost-recovery action . . . is an enforcement activity within the meaning of the statute." *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *see also Stanton Road*, 984 F.2d at 1023 (" 'enforcement' of CERCLA by a private party consists in suing to hold the polluter liable") (Canby, J., dissenting).

[11] A party may incur other expenses in litigation, such as docket, witness, and transcription fees. Had Congress intended to enable private parties to recover litigation expenses *other* than attorneys' fees, Section 107(a)(4)(B) would be unnecessary. A party may recoup most such litigation expenses as statutorily defined "costs" under 28 U.S.C. § 1920.

[12] *See Stanton Road*, 984 F.2d at 1023 ("When Congress amended CERCLA to permit such private litigants, among others, to recover the 'costs' of 'enforcement activities,' it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. . . . If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable") (Canby, J., dissenting).

Failure to permit parties that provide remediation to recover their full costs of enforcement creates perverse disincentives to cooperative cleanup of hazardous sites, a result wholly at odds with Congress' objectives in enacting CERCLA. If attorneys' fees are not recoverable as costs of "enforcement activities," then a recalcitrant PRP can threaten to prolong the litigation in a way that will reduce significantly the real ability of a party to recover its full response costs. Thus, the expense of attorneys' fees will become a bargaining chip by those PRPs less willing to carry their full share of responsibility for cleaning up a particular site. No reason exists to reward that kind of behavior. Moreover, it is fanciful to assume that the inability to recover full out-of-pocket costs will not affect every PRP's willingness to agree to incur significant cleanup expenses in the first place. Thus, the primary goal of ensuring prompt remediation of hazardous sites is directly harmed by the rule adopted by the court of appeals in this case. Accordingly, *amicus*' interpretation of Sections 101 and 107 is clearly preferable because it alone "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988).[13]

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[13] The case decided by the Eighth Circuit, *General Electric Co.* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991), provides an excellent example of this problem. There, Litton was responsible for *all* of the hazardous wastes at the site in question. Nevertheless, it never cooperated in any aspect of the proposed and implemented remediation of that site. It then refused to negotiate a reasonable settlement of the actual costs, and postponed reimbursement of those costs for five years while pursuing through litigation *all the way to this Court* strikingly weak arguments on the merits of Litton's duty to remediate. General Electric's attorneys' fees in prosecuting that action through three levels of the federal judiciary were unquestionably significant. Had GE not recovered its out-of-pocket costs, including its outside legal fees, its actual recovery for volunteering to remedy the site would have been woefully inadequate.

It is thus clear beyond doubt that Congress provided in private Section 107 cost-recovery actions the explicit authorization to award attorneys' fees that this Court found missing in both *Alyeska* and *Runyon*. See *infra* pp. 16-19. Various arguments have been advanced in the lower courts to overcome this conclusion, but each is unavailing.

1. It has been argued, based on scant legislative history,[14] that Congress intended for only the government, and not private parties, to recover attorneys' fees. This argument is refuted by the language and structure of the statute itself.

In the SARA Amendments, Congress placed the "enforcement" language in Section 101, a general definitional section that applies to *all* parties—both governmental and private—acting under the remedial provision of Section 107. 42 U.S.C. § 9601(25). Had Congress intended to limit the recovery of attorneys' fees to the government, it would not have placed the "enforcement" language in a provision of general applicability. Rather, the logical

[14] The sole support for the argument that Congress intended the "enforcement" language to cover attorneys' fees, but only EPA's attorneys' fees, is *Part I* of a House Report: "The section also modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. I, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49 (Report of House Committee on Energy and Commerce). However, *Part V* of this same report mentions the "enforcement" language without any limitation to EPA: "Subsection (d) amends the definition of what constitutes a response to include related enforcement activities, thereby permitting recovery of those costs." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. V, at 6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129 (Report of House Committee on Public Works and Transportation). Importantly, the *conference* report attached to the bill that ultimately was enacted into law does not even mention EPA. H. Conf. Rep. No. 962, 99th Cong., 1st Sess. 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278.

course would have been to insert the "enforcement activities" language into the CERCLA cost-recovery section applicable only to the government, Section 107(a)(4)(A), or expressly qualify the language in Section 101(25) to make plain that the definition was limited to actions taken by the government. That Congress followed neither of these courses further confirms the natural reading of the statute: attorneys' fee awards are authorized in *all* cost-recovery actions, private and governmental alike.

2. The United States has previously made the related argument that the term "enforcement activities" does not describe cost-recovery actions, but only actions to compel a PRP to conduct a cleanup, which can be brought exclusively by the government under Sections 104 and 106. But once again, that argument cannot be squared with Congress' decision to place the "enforcement activities" language in a section applicable to *both* the government and private parties.

Furthermore, if accepted, this argument would lead to the conclusion that the United States may recover attorneys' fees only when it brings suit to enjoin parties to conduct cleanups. Yet the United States regularly seeks and obtains its attorneys' fees incurred in actions brought under Section 107 to recover costs for cleanups that it has conducted itself. See, *e.g.*, *United States* v. *Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988) (relying on Section 101(25) to award EPA the attorneys' fees it incurred in bringing a Section 107(a) cost-recovery action); *United States* v. *Northernaire Plating Co.*, 685 F. Supp. 1410, 1412-13, 1417-18 (W.D. Mich. 1988) (United States conducted cleanup action and then brought Section 107 action to recover its costs, including attorneys' fees incurred in the cost-recovery action). Because private parties, like the government, bring cost-recovery actions under Section 107, that section provides *identical*

relief to both. Costs of "enforcement activities" can have only one meaning.[15]

3. Section 104(b)(1), entitled "Information; Studies and Investigations," authorizes the federal government to perform environmental studies and investigations (including legal investigations).[16] But the government has argued that by using the term "legal" in a section of CERCLA that pertains to the government, Congress manifested an intention that attorneys' fees not be recoverable in private cost-recovery actions.

This argument is nothing more than a *non sequitur* that disregards the plain language of Section 107. Section 107 on its own defines cost-recovery actions and creates the liability for "any other necessary costs of response."[17] Nothing in Section 104(b) serves to limit the rights Section 107 explicitly confers on *all* actors enforcing CERCLA.

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[15] It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992). "Ascribing various meanings to a single iteration of [costs of enforcement activities]—reading the word differently for each [category of party] to which it applies—would open Pandora's jar." *Ratzlaf* v. *United States*, No. 92-1196, 62 U.S.L.W. 4037, 4039 (U.S. Jan. 11, 1994) (citation omitted). *Accord, Department of Revenue* v. *ACF Indus., Inc.*, No. 92-74, slip op. at 9 (U.S. Jan. 24, 1994).

[16] Section 104(b)(1) provides in part:

> the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

42 U.S.C. § 9604(b)(1).

[17] "Section 107 of CERCLA sets forth the provisions imposing liability for the cost of hazardous substance clean-ups under the Act." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. III, at 17 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3040 (Report of House Committee on the Judiciary).

Further, the government misconstrues the function of Section 104(b)(1) in the CERCLA scheme. Section 104(b)(1) does not, as the government supposes, authorize it to recover its attorneys' fees in cost-recovery actions.[18] Rather, as its title indicates, this section serves only to provide authority for the federal government to conduct three distinct types of investigations and studies related to the cleanup goals of CERCLA, namely, studies (1) to plan and direct response actions, (2) to recover the costs of response actions, and (3) to enforce CERCLA.

But CERCLA provides the authority to conduct each of the activities to which the studies relate in *separate* sections.[19] Consequently, Section 104(b) can be construed to provide the actual authority for those activities, as opposed merely to authorizing studies and investigations, only by reading it to be redundant of other CERCLA provisions. This is plainly unwarranted.

4. Finally, awarding attorneys' fees here does not depend upon the type of "policy" analysis forbidden by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *Alyeska* prohibits an award of attorneys' fees based solely on "the courts' assessment of the importance of the public policies involved in particular cases." *Id.* at 269. Here, by contrast, a clear statutory basis exists for making such an award: as shown

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[18] Even if one accepts the notion that Section 104 authorizes an award of attorneys' fees to the government, private parties are nonetheless entitled to awards of attorneys' fees incurred in bringing cost-recovery actions under Section 107, as petitioner has convincingly demonstrated.

[19] The authority to plan and direct response actions is found in Section 104(a) (42 U.S.C. § 9604(a)) and Section 121 (42 U.S.C. § 9621); the authority to recover costs is found in Section 107(a)(4)(B) (42 U.S.C. § 9607(a)(4)(B)); and the authority to enforce CERCLA is found in a variety of sections, including, among others, Sections 104(a) (42 U.S.C. § 9604(a)), 106(a) (42 U.S.C. § 9606(a)), and 107(a) (42 U.S.C. § 9607(a)).

above, the text of CERCLA explicitly authorizes private parties to recover their "response costs," including all "costs" of "enforcement activities."

It is unsurprising that the policy concerns that motivated Congress in enacting and later strengthening CERCLA are also served by a recognition that private parties may recover attorneys' fees under Section 107. As fee awards will promote CERCLA's fundamental goal of encouraging private remediation of hazardous waste contamination, this application of Sections 107 and 101(25) appropriately gives effect to the plain language of the statute *and* harmonizes CERCLA's specific provisions with its general underlying goals. This Court has counseled that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); see also *Department of Revenue* v. *ACF Indus., Inc.*, *supra*, slip op. at 9-10.

In sum, private parties invoke Section 107 in precisely the same way the United States does when it seeks to collect CERCLA response costs. Given that private parties have the right to bring cost-recovery actions under CERCLA, that both the government and private parties look to the same provision for recovery of response costs, and that the definition of "response" is the same for all parties pursuing an action under Section 107, CERCLA provides clear authority for recovery of attorneys' fees.

C. Congress' Intent In CERCLA To Permit Private Parties To Recover Their Attorneys' Fees Is Clear, And No Particular "Magic Words" Are Required.

Contrary to the decisions of the Sixth and the Eighth Circuits,[20] the court of appeals concluded—with one judge

[20] *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991);

dissenting—that CERCLA does not authorize private parties to recover attorneys' fees as a cost of "enforcement" in cost-recovery actions. *Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993). Relying on *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Runyon* v. *McCrary*, 427 U.S. 160 (1976), the court concluded that "the words 'necessary costs of response' do not expressly authorize an award of attorneys' fees for legal expenses incurred in remediating the contamination of property." *Stanton Road*, 984 F.2d at 1019. That reliance was misplaced; the majority erred in reading *Alyeska* and *Runyon* as establishing a wooden rule that attorneys' fees may be awarded only if the underlying statute *expressly* contains the terms "attorneys' fees" or "legal costs," regardless of Congress' actual intent expressed in the statute. *Stanton Road*, 984 F.2d at 1019.

Alyeska held that, under the American Rule, attorneys' fees may not be awarded under a private attorney general theory merely because a litigant has vindicated an important public interest. To the contrary, the Court explained, attorneys' fees generally are to be awarded only when Congress has adopted an "explicit provision" for such an award. 421 U.S. at 260.

Nothing in *Alyeska* bars an attorneys' fees award to a private party in a CERCLA case. Unlike the present case, the prevailing party in *Alyeska* did not rely on *any* statute as the basis for a fees award. By contrast, CERCLA *explicitly* authorizes private parties not only to act as "private attorneys general," but also to recover all "necessary costs" of doing so.

This case is also very different from *Runyon*. There, the petitioner claimed that 42 U.S.C. § 1988 "implicitly"

accord, *Donahey* v. *Bogle*, 987 F.2d 1250, 1256 (6th Cir.), *cert. denied*, 114 S. Ct. 636 (1993).

authorized an award of attorneys' fees to a successful litigant bringing a case under 42 U.S.C. § 1981, part of the Civil Rights Act of 1866. 427 U.S. at 184. The petitioner argued that Section 1988's broad remedial purpose, which "authorize[s] federal courts, where federal law is unsuited or insufficient 'to furnish suitable remedies,' to look to principles of the common law, as altered by state law,"[21] *id.* at 185 (quoting *Moor* v. *County of Alameda*, 411 U.S. 693, 702-03 (1973)), required such an award. This Court rejected the argument that such "generalized commands," 427 U.S. at 186, constituted an "explicit congressional authorization . . . [of] attorneys' fees." *Id.* at 185.

No such "generalized commands" are at issue here. Instead, Congress chose to use language in CERCLA—authorizing recovery of "necessary costs of response," 42 U.S.C. § 9607(a)(4)(B), and defining "response" to include "enforcement activities," *id.* § 9601(25)—that makes clear Congress' intent to permit the recovery of attorneys' fees.[22]

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[21] The section then provided:

> The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of . . . [the] cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988, *quoted in Runyon* v. *McCrary*, 427 U.S. 160, 184 (1976).

[22] Moreover, the majority of the court of appeals ignored entirely this Court's reasoning in *Runyon*. The *Runyon* Court did not begin

The court below not only failed to observe the crucial contrast between the statute involved in *Runyon* and the language of CERCLA, but also distorted *Runyon*'s requirement of an "explicit" statutory authorization for an award of attorneys' fees. The majority erroneously converted the "explicit" requirement into a rule that Congress must use certain "magic words." Elevating form over substance, the court concluded in effect that attorneys' fees may be awarded only if a statute "expressly" mentions that term or an exact synonym, even if, employing conventional statutory construction, the statute "explicitly" or "clearly" reflects Congress' intention to allow fees awards. *Stanton Road*, 984 F.2d at 1019.

That the correct approach is to ascertain Congress' explicit intent rather than search for "magic words" is confirmed by *both* cases in which this Court has previously considered analogous problems under CERCLA. In *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), this Court held that CERCLA abrogated the States' Eleventh Amendment immunity from suits for monetary damages. *Id.* at 10. Beginning with the well established constitutional tenet that Congress may override the States' Eleventh Amendment immunity only when it makes "its intent

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and end its inquiry by searching the statute in question for the words "attorneys' fees." Had it taken that appoach, its opinion would have been very brief, for the Civil Rights Act of 1866 indisputably contained no such term. Instead, the *Runyon* Court construed the 1866 Act employing traditional tools to determine Congress' actual intent concerning attorneys' fees. 427 U.S. at 184-86. After examining the statutory text, the Court examined prior case law and the legislative history, and concluded that "nothing in the legislative history of that statute suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended." *Id.* at 184-85. The *Runyon* Court thus looked to the statutory language first, and confirmed its conclusion by reference to the context and purpose of the statute as a whole; the Court pointedly did *not* require the issue to be approached by Congress using any particular formulation. In this case, such an analysis results in the conclusion that CERCLA *does* authorize the recovery of attorneys' fees by private parties, as discussed above.

to do so 'unmistakably clear,'" this Court examined CERCLA as a whole and concluded that it displayed the requisite clarity of intent, even though the statute never mentioned the Eleventh Amendment. *Union Gas* decisively rejected the argument that Congress could abrogate the Eleventh Amendment only by using statutory language similar to language it had previously employed, stating: "If no magic words are required for abrogation, then each statute must be evaluated on its own terms, not defeated by reference to another statute that uses more specific language." *Id.* at 13 n.4. Likewise, in *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 363 (1986), this Court held that portions of CERCLA "express[ly]" preempted state law even though the critical statutory language was "inartful" and "not a model of legislative draftsmanship."

* * * *

CERCLA's plain language authorizes an award of attorneys' fees in private cost-recovery actions. No other construction of CERCLA makes either linguistic or rational sense. In Section 107, Congress permitted *private parties* to recover "response costs." In Section 101, Congress defined that term to include the "costs" of "enforcement activities." Because a private cost-recovery action is an "enforcement activity," and because the major cost incurred in that enforcement activity is attorneys' fees, Sections 101 and 107 of CERCLA can only be read to permit a private party to recover its attorneys' fees expended in a cost-recovery action. The court below erred, both as a matter of logic and as a matter of statutory interpretation, in insisting that Congress can authorize attorneys' fees awards only through the use of "magic words."

The provisions of CERCLA thus decidedly fulfill the requirements for an exception to the American Rule. But it should be recognized that a party's pursuit of its attorneys' fees in a Section 107 action does *not* fit the usual circumstances under which the American Rule generally

applies. The United States' legal system, in contrast to others, considers the party to have been "made whole" upon recovery of damages, *without* recovering attorneys' fees. See generally *Alyeska*, 421 U.S. at 261. Typically, therefore, a prevailing party seeks to recover its attorneys' fees as part of its expenses; the fees award is thus an adjunct to the damages the party has already recovered, not a part of the underlying claim on the merits. This typical situation is altered for the CERCLA plaintiff in a cost-recovery action: The language and structure of CERCLA make clear that "costs" of "enforcement activities"—which must necessarily encompass attorneys' fees—themselves constitute *part of the party's damages.*

Accordingly, it should come as no surprise that Congress did not express its intention to allow attorneys' fees to be recovered by private parties by using the classic terms traditionally employed in other federal statutes to shift attorneys' fees from a plaintiff to a defendant. The unique nature of claims under Section 107 explains the equally unique formulation Congress employed to confer an express right to attorneys' fees as part of private enforcement actions. What dictates the proper outcome of the case is that the language in Sections 101 and 107 is sufficiently plain to provide an exception to the American Rule even for a typical federal statute; it follows *a fortiori* that the language is sufficient to entitle a private party to recover attorneys' fees in the relatively unusual circumstances created by CERCLA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals, and hold that private parties may recover attorneys' fees under CERCLA.

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